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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6713

ANN KEYES

Appellant

vs.

STATE OF OKLAHOMA DEPARTMENT OF INSTITUTIONS SOCIAL AND REHABILITATIVE SERVICES, and L. E. RADER, Director of the Department of Institutions, Social and Rehabilitative Services,

Appellees

IN THE MATTER OF: KEYES, DERRICK
a child under 18 years of age,
to-wit: 2 1/2 years.

JURISDICTIONAL STATEMENT

CHARLES DAVIS
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TABLE OF CONTENTS

OPINION BELOW 1

GROUNDS OF JURISDICTION OF SUPREME COURT..... 1

QUESTIONS PRESENTED..... 2

STATEMENT OF THE CASE..... 2

SUBSTANTIALITY OF FEDERAL QUESTIONS..... 3

CONCLUSION..... 5

CERTIFICATE OF SERVICE..... 5

APPENDICES:

A. OPINION BELOW..... A1 - A17

B. 10 Okla. St. Ann. §1130 (1971) B1

C. ORDER DENYING REHEARING C1

D. NOTICE OF APPEAL D1

INDEX OF AUTHORITIES

CASES:

Cleveland Board of Education v. Le Fleur, 414 U.S. 632, 94 S.Ct. 791 (1974). 3

Hicks v. Miranda 422 U.S. 332 (1975). 3

May v. Anderson 345 U.S. 529, 73 S.Ct. 840 (1955). 3

Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923). 3

Pierce v. Society of Sisters, 268 U.S. 510, 95 S. Ct. 571 (1925). 3

Poulos v. New Hampshire, 345 U.S. 395 (1953). 3

Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, (1944). 3

STATUTES:

10 Okla. St. Ann. §1130 (1971). 2, 3, 4

28 U.S.C. §1257(2). D1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6713

ANN KEYES,

Appellant,

vs.

STATE OF OKLAHOMA DEPARTMENT OF INSTITUTIONS, SOCIAL AND REHABILITATIVE SERVICES and L. E. RADER, Director of the Department of Institutions Social and Rehabilitative Services,

Appellees,

IN THE MATTER OF: KEYES DERRICK, a child under 18 years of age, to-wit: 2 1/2 years

JURISDICTIONAL STATEMENT

Pursuant to Rule 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellant, Ann Keyes, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Order entered by the State of Oklahoma Supreme Court in this case and should exercise such jurisdiction herein.

OPINION BELOW

The opinion of the State of Oklahoma Supreme Court appears in 574 P 2d 1026 and is included herein as Appendix A (pages A1 - A17).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action of the Juvenile Division of Tulsa County District Court, State of Oklahoma, terminating the parental rights of Appellant Keyes, to her son. An appeal was made to the State of Oklahoma Supreme Court alleging that the statute, 10 OS 1130, included herein as Appendix B (page B1), was unconstitutional as applied to Appellant. The State of Oklahoma Supreme Court held that the statute was constitutional and affirmed the Order of Tulsa County District Court. Appellant's Petition For Rehearing before the Oklahoma Supreme Court was denied on February 8, 1978 said order included herein as Appendix C (page C1). A timely notice of appeal was filed in the Oklahoma Supreme Court on May 4, 1978, included herein as Appendix D (page D1).

The jurisdiction of this Court is invoked under the provisions of United States Code, Section 1257(2).

Cases that sustain the jurisdiction of this Court include:

Poulos vs. New Hampshire
345 U.S. 395 (1953)

Hicks vs. Miranda
421 U.S. 332 (1975)

QUESTIONS PRESENTED

Whether the statute, 10 OS 1130 (1971), which permits the termination of parental rights upon a finding that (1) after a period of six months has passed since an adjudication of a child as being a dependent/neglected child and (2) upon an allegation that the parents had failed to correct the conditions giving rise to the child's adjudication is unconstitutional as applied to Appellant when the allegations of (2) have no relationship to those conditions existing when this child was found to be dependent/neglected child.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

On January 18, 1974, a Petition was filed in the Juvenile Division of Tulsa County District Court in the matter styled,

IN THE MATTER OF DERRICK KEYES
A child under 18 years of age,
to-wit: 11 months

JFJ-74-43

The petition alleged that the child was suffering from hypernatremia and severe anemia and has not received proper nourishment or medical care and on that basis was adjudicated a dependent/neglected child and made a ward of the Court with custody vested in Appellee. The physical custody of the child was returned to Appellant with Appellee supervising said custody, per Order of Tulsa County District Court on March 19, 1975.

That on September 20, 1975, Appellant left the child in the care of Robert Wesley, the child's father, while Appellant went shopping with Robert Wesley's wife. Upon Appellant's return in the afternoon of September 20, 1975, the child was observed to be bleeding from the anus. Events subsequently were (1) Appellant taking child to the Oklahoma Osteopathic Hospital in Tulsa, Oklahoma, where emergency surgery was performed on the child (2) Robert Wesley being arrested on a sodomy charge, (3) the filing of a Motion to Terminate the Parental Rights in the Juvenile Division of Tulsa County District Court JFJ-74-43, and (4) the dismissal of criminal charges against Robert Wesley.

Hearings were held on November 3, 1975 and December 8, 1975, on the Motion to Terminate Parental Rights in which the Referee of the Juvenile Court terminated Appellant Keyes and Robert Wesley's parental rights to Derrick Keyes. The recommendation of the Referee being confirmed by the Judge of the juvenile Court.

A timely appeal was made to the State of Oklahoma Supreme Court, which affirmed the trial court. A Petition for Rehearing before said Court was denied on February 8, 1978.

The issue of the constitutionality of the statute 10 OS 1130 as applied to Appellant was raised in argument before the Court in objecting to the finding and recommendation of the Referee of the Juvenile Division Tulsa County District Court, said objection being overruled and again before the State of Oklahoma Supreme Court where it was argued that said statute was vague and overly broad and as such Appellant was denied due process as guaranteed by the Constitution of the State of Oklahoma and the United States.

The State of Oklahoma Supreme Court passed on the constitutional validity by stating that it "squarely confronts it" and simply stated that the injuries were consistent with anal abuse and failed to note the past history of anal bleeding and further stated that "both the factual basis for termination and the legal standards permitting same were set forth clearly and precisely and that the Appellant has fair and adequate warning of what parental conduct was found to be at issue solely the "care and protection necessary for the child's physical health."

Throughout the proceeding in Tulsa County District there was no evidence introduced that even suggested that the conditions existing at the time of the child's adjudication and leading to same had not been corrected.

The evidence showed that Robert Wesley had been allowed visitation with the child and there was no reason to deny him contact with the child (Transcript of Proceeding, November 3, 1975, p. 45 hereinafter TP 11/3.

The evidence further showed that Appellant cooperated freely with the police in their investigation regarding the sodomy information filed against Robert Wesley.

The Court commenting on the evidence, Transcript of Proceedings December 8, 1975, p. 17 stated:

"According to the evidence the mother was not home at the time and may not have knowledge of how this occurred."

SUBSTANTIALITY OF FEDERAL QUESTIONS

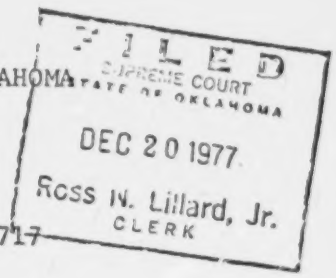
Okla. Stat. Tit. 10 §1130 (1971) permits termination of a fundamental right, that of the parent to raise his child without arbitrary government interference. The parental right is fundamental with the concept of ordered liberty and is guaranteed by the First, Ninth and Fourteenth Amendment. It is what Justice Brandeis called the right to be let alone from arbitrary and capricious government interference. In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923), Justice McReynolds said that the Fourteenth Amendment guarantees the fundamental right to marry, establish a home and to bring up children. In Pierce v. Society of Sisters, 268 U.S. 510, 95 S.Ct. 571 (1925), the court made clear that the parents' rights to raise and educate children cannot be arbitrarily interfered with by the government. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944), the Court reaffirmed that there is a private realm of the family which the state cannot enter. Later, in May v. Anderson, 345 U.S. 528, 73 S.Ct. 840 (1955), the Court declared that the care, custody and management of a minor child is fundamental and must be left to the discretion of the parents. More recently, Cleveland Board of Education v. Le Fleur, 414 U.S. 632, 94 S.Ct. 791 (1974), the United States Supreme Court declared that freedom of marriage and family rights is a basic guarantee of the Fourteenth and Ninth Amendments.

Vagueness cannot be tolerated in the law especially in the area of fundamental rights. Due process under the Fourteenth Amendment requires the state to clearly identify, specify and define the harm from which the child needs protection and to proscribe what parental conduct so contributes to that harm that the state is justified in terminating the parental relationship.

The statute 10 OS §1130 clearly specifies that it is conditions that continue to exist for a period of at least six months following a initial finding or adjudication that permits a termination of parental rights and to allege same and in fact show different conditions subjects Appellant to constitutionally deficient procedure.

APPENDIX A

FOR OFFICIAL PUBLICATION



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

N THE MATTER OF: KEYES, DERRICK,)
)
child under 18 years of age,) No. 49,717
)
o-wit: 2 1/2 years.)

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable Joe Jennings, Judge

Appeal by Appellant natural mother, Ann Keyes, from an rder of the Trial Court, confirming the findings and recommen- ations of the Referee, Juvenile and Family Relations Division, hat all parental rights of the natural parents of Derrick Keyes e terminated.

A F F I R M E D

harles Davis
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RNES, J.:

This is an appeal by Appellant, Ann Keyes, from an order the Trial Court terminating her parental rights and those of e natural father, Robert Wesley, to their child, Derrick Keyes, e two and one-half years at the time of the hearing. The natal father appeals in Case No. 49,718, and the natural mother peals in Case No. 49,717.

The pertinent facts are as follows: The child in question, rrick Keyes, was living in the care and custody of his natural ther, Appellant Ann Keyes, with the concurrence of Robert Wesley, e child's natural father, who was a sometimes resident of the ther's home. On January 5, 1974, the child was admitted to llcrest Hospital in Tulsa, Oklahoma, with severe medical probms, including pneumonia, severe dehydration, vomiting, hypertremia, and severe anemia.

As a result of subsequent investigation, the State, through e Department of Institutions, Social and Rehabilitative Services epartment), filed a petition in the Tulsa County District Court leging the aforementioned medical problems were the result of roper care by the child's mother. The child was made a ward the Court pursuant to a temporary order, with custody in the artment, and later adjudicated a dependent and neglected child, h custody in the Department, pursuant to an order of May 17, 4, setting a review date for July 17, 1974. Further hearings e held September 4, 1974, and January 8, 1975, at which time tody was continued in the Department.

On March 19, 1975, both parents again appeared before the rt and temporary custody was restored to the natural mother er the Department's supervision and review date set for Septem- 11, 1975. On that date the matter was continued to permit the ly assigned caseworker to become acquainted with the case and provide the Court with a written report. Hearing was reset for ober 1, 1975.

A 2

However, on September 20, 1975, Appellant Ann Keyes left ild in Appellant Robert Wesley's care while she went shop- ith Mrs. Wesley. Upon return, the child was passing blood stool, whereupon Appellants took the child to Oklahoma athic Hospital, in Tulsa, Oklahoma.

On September 23, 1975, a motion was filed asking that rental rights of both Appellants be terminated, alleging tions existing January 18, 1974, had not been shown to be ted, that on September 20, 1975, Appellant Wesley had ted the child, and that permanent termination of parental was necessary to protect the physical and mental health orals of the child.

Temporary custody was again placed in the Department by of September 23, 1975. Hearings were held before Referee Kannady in Tulsa County District Court, Juvenile and Family ions Division, on the motion asking that parental rights be nated. Appellants herein were represented by counsel. The Referee found, after hearing testimony and evidence, that onditions that had existed had not changed, that the child's cal health continued to be in jeopardy, and that it was sary for the proper care and protection of the child and s best interests that all parental rights of the natural ts be terminated, and that the child be placed in permanent dy of the Department, with said Department to plan for and ent to the adoption of the child.

The matter came on for hearing before the Associate Dis- t Judge presiding over the Juvenile and Family Relations sion of the Court on April 15, 1976, at which time he entered rder stating the Appellants failed to show any prejudicial

A 3

, to protect the child's physical and mental well-being. Thereafter, Appellant and Robert Wesley filed their inde- t appeals before this Court seeking to vacate the Trial s judgment and urging that custody of the child be re- to both natural parents.

Appellant Keyes urges as error (1) that she was denied ocess under 10 O.S. 1971, § 1130, which she contends is and overly broad; (2) that the Trial Court erred in over- the demurrer to the State's evidence; and (3) that a ter- on of parental rights is not a permissible dispositional and that denial of trial by jury was violative of her tutional and statutory rights.

Before considering Appellant's allegations of error, we t necessary to review the evidence. Medical expert testi- eflects a life-threatening injury to the child which, based the doctor's experience and examination of Derrick Keyes, be consistent with anal abuse. However, medical testimony ls cultures from specimens obtained in the hospital emergency in search for sperm, acid phosphatase secretion, etc., were egative.

A social worker with the Child Abuse Registry of the State re Department testified she examined the child while in the tal, observing small round sores on the back of one leg and arm and a looped scar on his leg. She further indicated no njuries nor rectal or anal problems had occurred since the 's release from the hospital and while in foster care.

Appellant Keyes testified the child had been bleeding from ectum before the September 20, 1975, incident and that she aken him to Moton Health Center three or four times, where octor told her the bleeding could have resulted from the 's stool being hard, constipation, or something of that na-

A4

We will now consider Appellant's allegations of error.
first contended that 10 O.S. 1971, § 1130, is unconstitu-
ly vague on its face and has not been sufficiently narrowed
case law of Oklahoma to cure such vagueness. That stat-
ovides:

"A. The finding that a child is delinquent, or mistreated or neglected, shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:

"1. Upon a written consent of a parent, including a parent who is a minor, acknowledged as provided in 10 O.S. 1961, Section 60.5(5), who desires to terminate his parental rights; or

"2. A finding that a parent who is entitled to custody of the child has abandoned it for one (1) year; or

"3. A finding that a parent who is entitled to custody of the child:

"a. has failed to give the child the parental care or protection necessary for his physical or mental health, or

"b. although financially able, has willfully neglected to provide the child with the necessary support or education, or

"c. is unfit by reason of debauchery, intoxication, or habitual use of narcotic drugs, or repeated lewd or lascivious behavior or other conduct that is detrimental to the physical or mental health or morals of the child, and the parent has failed to show that the conditions have been corrected within a period of six (6) months after the child, or children, were adjudged dependent or neglected and a permanent termination of parental custody of the child, or children, is necessary to protect its physical or mental health or morals; provided further, that the court may extend the time in which such parent may show the condition has been corrected, if, in the judgment of the court, such extension of time would be in the best interest of the child or children; or

"4. A finding that a parent, having been ordered to contribute to the support of the child, has willfully failed to contribute during the preceding year.

"5. A finding that a parent has physically abused a child subsequent to having been found guilty of child beating or child abuse either in a criminal action or specifically so found in a child dependency neglect action in a proceeding in the juvenile division of a district court.

"B. However, nothing contained herein shall prevent a court from immediately assuming custody of a

"5. A finding that a parent has physically abused a child subsequent to having been found guilty of child beating or child abuse either in a criminal action or specifically so found in a child dependency neglect action in a proceeding in the juvenile division of a district court.

"B. However, nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare. Nothing in this act shall be construed to authorize any court to terminate the rights of a parent to a child, solely because the parent, in good faith, provides for his child, in lieu of medical treatment, treatment by spiritual means alone through prayer in accordance with the tenents and practice of a recognized church or religious denomination."

This Court finds that the issue of constitutional validity . 1971, § 1130, squarely confronts it. The injuries here istent with sustained anal abuse, and negate the possibility njury administered by a two and one-half year old child's capabilities.

Appellant places great reliance upon *Alsager v. District Polk City, Iowa, 406 F. Supp. 10 (S.D. Iowa, 1975), affirm- F.2d 1137 (8th Cir., 1976),* to support the position that 971, § 1130, is unconstitutional. In that case the United strict Court for the Southern District of Iowa was pre- th a constitutional challenge to the Iowa statute dealing ination of parental rights. The challenge had been pre- prior proceedings (384 F. Supp. 643), in which the Dis- rt declined to rule thereon until remand by the Circuit Appeals (518 F.2d 1160, 8th Circuit) with an appropriate . In holding the Iowa statute unconstitutional, the ourt relied upon (A) its defective vagueness and the fact Iowa Supreme Court had never judicially restricted its on; and (B) its failure to accord procedural due process ring "clear and convincing evidence" as opposed to the rance standard then in effect."

AG

Alsager, supra, declared the Iowa Statute, Code of Iowa, § 232.41, overly vague, both on its face and as applied to the Alsagers. The Court found that neither the case law nor the way in which the law had been applied in that case had sufficiently narrowed the statute and defined the standard of necessary parental care and protection. The Court said:

> "In sum, the Iowa parental termination standards of 'necessary parental care and protection' and of '(parental) conduct . . . detrimental to the physical or mental health or morals of the child,' are unconstitutionally vague, both on their face and as applied, in that (1) they do not, and did not here, give fair warning of what parental conduct is proscribed, (2) they permit, and permitted here, arbitrary and discriminatory terminations, (3) they inhibit, and inhibited here, the exercise of the fundamental right to family integrity. * * * "

The Iowa Court said standards of "necessary parental care and protection," § 232.41(2)(b), and of "parental conduct . . . detrimental to the physical or mental health or morals of the child," § 232.41(2)(d), are susceptible to multifarious interpretations, which prevent the ordinary person from knowing what is and is not prohibited. The Iowa Court noted that a reading of the petition and the termination statute would not have given the Alsagers notice of what they were doing wrong, i.e., they were not given a factual basis from which to predict how they should modify their past conduct, their "parenting," to avoid termination.

We are not persuaded by the *Alsager case, supra,* nor the reasoning of *Roe v. Conn, 417 F. Supp. 769 (N.D. Ala. 1976),* which found a statute on child neglect unconstitutionally vague, adopting the reasoning and language of *Alsager, supra,* which requires the State to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the State is justified

in terminating the parent-child relationship.

We agree with Appellants that the terms such as "care and protection necessary for the child's physical or mental health" are terms about which men and women of ordinary intelligence may disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views, and to that extent such terms are vague. However, in our view, we do not find the statute unconstitutionally vague and overly broad nor couched in terms that have no common meaning.

We observe the Oklahoma termination statute, unlike that of Iowa, requires that the State grant parents six months at a minimum to correct the conditions found to be true as to neglect, 10 O.S. 1976 Supp., § 1130(A)(3)(a).

We also note that in the instant case, in both the original petition filed January 18, 1974, and the motion regarding termination filed September 23, 1975, both the factual basis for termination and the legal standards permitting same were set forth clearly and precisely and that Appellants had adequate and fair warning of what parental conduct was found to be at issue -- care and protection necessary for the child's physical health.

Appellant Keyes next raises the issue that her demurrer to the State's evidence was improperly overruled by the Trial Court. She argues that the record fails to show that any of the allegations of the State's petition filed January 18, 1974, existed on September 23, 1975, when the State filed its motion to terminate parental rights, alleging Keyes had failed to correct the conditions which resulted in the child's adjudication as dependent and neglected, after the six-month statutory period.

In determining whether a demurrer to the evidence should be sustained, the Trial Court should consider as true all evidence

A8

favorable to the party against whom the demurrer is directed, and all inferences that may be reasonably drawn from such evidence, and disregard all evidence favorable to the demurrant. *Stegall v. Davis, 280 P.2d 706 (Okl. 1955); Nye v. Cox, 440 P. 2d 683 (Okl. 1968).* Based upon the motion, allegations and evidence in the record, we think the Trial Court properly overruled Appellant's demurrer.

Finally, Appellant Keyes argues that the denial of trial by jury in the termination proceedings was violative of her constitutional and statutory rights. This question was recently considered by this Court in *J.V. v. State of Oklahoma, Department of Institutions, Social and Rehabilitative Services, and L. E. Rader, Case No. 48,897, 48 O.B.J. 2636,* _____*P.2d* _____ *(Okl. 1977),* and determined contra to Appellant.

AFFIRMED.

HODGES, C.J., LAVENDER, V.C.J., and DAVISON, IRWIN, and BERRY, JJ., concur.
WILLIAMS, SIMMS and DOOLIN, JJ., dissent.

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF: KEYES, DERRICK, a child under 18 years of age, to-wit: 2-1/2 years.) No. 49,717

FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 20 1977
Ross N. Lillard, Jr.
CLERK

DISSENTING OPINION

SIMMS, J:

There are two issues presented by this appeal. The first is whether the procedure by which appellant's parental rights were terminated denied her "fundamental fairness" as guaranteed by procedural due process. The second is whether the standards of parental conduct proscribed by 10 O.S. 1971, § 1130 are unconstitutionally vague.

The majority opinion overlooks the first issue and, in deciding the second, holds the statute constitutionally specific and precise. I must respectfully dissent. I believe that proper resolution of either issue requires reversal of this action.

In affirming this judgment, the majority sanctions a mode of terminating parental rights which:

(1) relieves the State of carrying its burden of proving by clear and convincing competent evidence that the facts are statutorily sufficient to support an order of termination; and

(2) places upon the parents the burden of disproving the sufficiency of facts necessary to support an order of termination; and

(3) permits the State to "bootstrap" its termination proceeding upon the circumstances which originally led to a child's adjudication even though those circumstances no longer exist and are unrelated to the facts upon which the termination action is based; and

(4) allows incompetent evidence to be introduced in support of termination by designating the proceeding as a mere "dispositional" hearing of the original adjudication; and

(5) denies parents the mandatory six month "grace period" to effect a change of conditions, even though this statutory six month provision was found by the majority to be the essential factor distinguishing our statute from the unconstitutional Iowa statute.

AIC

A short summary of the facts of this case illustrates these problems.

Derrick was first brought to the attention of the court by a petition filed on January 18, 1974, which alleged that he was a dependent and neglected child by reason of his mother's failure to provide him with adequate nutrition and medical care and that as a result of her alleged failure, he was suffering from hypernatremia and severe anemia. (For convenience, these conditions will be referred to as "Facts A.) The petition did not seek termination of appellant's parental rights. The petition further alleged that Derrick's father was unknown. Hearing was subsequently held and, upon stipulations and admissions of appellant, the court found the allegations "true as to the mother's interests." Derrick was adjudicated a dependent and neglected child, made a ward of the court, and placed in the custody of the Department. Although Robert Wesley, (appellant in companion case No. 49,718) did appear personally before the court, the matter of his interests was set off and never adjudicated. He was neither alleged, nor found, to be responsible in any way for Derrick's health problems.

Later in March of 1975, the court ordered Derrick's custody returned to appellant under supervision of the Department based upon a finding that this change of custody would be in his best interests.

Then, on September 23, 1975, following Derrick's hospitalization for rectal bleeding, an unverified motion to terminate the appellant's parental rights was filed. While it is my opinion that an unverified motion is not sufficient to vest the court with jurisdiction to determine the issue of termination, inasmuch as 10 O.S. 1971, § 1103 requires a verified petition, I shall not further belabor that point here. My views on this issue are fully set forth in my Dissenting Opinion in *J.V. v. State of Oklahoma, Department of Institutions, Social and Rehabilitative Services, Okl., 48 OBJ 2639, ____P.2d ____ (November 26, 1977).*

The substance of the motion alleged that:

> * * * *[Derrick] is 2-1/2 years of age, declared and adjudged to be dependent-neglected on January 18, 1974. That Robert Wesley and Ann Keyes are the natural father and mother of said child *and, after*

A 11

at least six (6) months since the adjudication of said child, have failed to show that the conditions which resulted in the dependency-neglect of said child have been corrected.

On or about 9/20/75, while in the care of said natural father, said child was assaulted and suffered a perforated colon, severely lacerated rectum, five small lesions on the back of his right thigh; said natural mother placed said child in the care and control of said natural father, and said father either assaulted said child, resulting in the aforementioned injuries, or failed to protect said child from said injuries; due to the above circumstances, said child underwent surgery on 9/20/75 and is currently residing at the Oklahoma Osteopathic Hospital, Tulsa, Oklahoma.

That permanent termination of the parental custody of said child is necessary to protect his physical and mental health and morals."

Hearing was held and the State presented four witnesses in support of its motion. Each witness testified about Derrick's hospitalization for rectal bleeding on September 20, 1975, and his subsequent condition. (The facts brought forth at this hearing will be referred to as "Facts B".) Appellant objected to this testimony as unrelated to the motion's allegation that termination was being sought because the parents had not, after at least six months, corrected the conditions ("Facts A") which resulted in Derrick's adjudication on January 18, 1974. These objections were overruled as was appellant's demurrer to the evidence.

The State did not prove by clear and convincing competent dence at either hearing that the facts warranted and necessitated minating appellant's parental rights. The first hearing did not olve termination; the only issue was whether, by reason of cts A", Derrick was a dependent and neglected child. At the second rimy which concerned the motion to terminate, the State was re- ved of its burden of proof because that hearing, although concerned h "Facts B", was treated as a dispositional hearing of the original ufication.

Neither this appellant nor appellant Wesley were allowed the datory six month period within which to change conditions and pre- t the termination order from issuing. As termination was not sought the first proceeding as to either parent (it should be remembered t appellant Wesley was not even part of that proceeding), it could rdly be said that they had a period of six months to prevent that ich could not occur. In fact, Derrick's mother did correct those aditions and Derrick's custody was returned to her.

"b. although financially able, has willfully neglected to provide the child with the necessary support or education, or

"c. is unfit by reason of debauchery, intoxication, or habitual use of narcotic drugs, or repeated lewd or lascivious behavior or other conduct that is detrimental to the physical or mental health or morals of the child, and the parent has failed to show that the conditions have been corrected within a period of six (6) months after the child, or children, were adjudged dependent or neglected and a permanent termination of parental custody of the child, or children, is necessary to protect its physical or mental health or morals; provided further, that the court may extend the time in which such parent may show the condition has been corrected, if, in the judgment of the court, such extension of time would be in the best interest of the child or children;

* * * "

There is only one sensible and constitutional construction of statute. It is this: the statute presupposes that termination arental rights was sought at the adjudicatory hearing, that the er was tried and the matter resolved adverse to the parents. In r words, the statute contemplates termination as a remedy for itions detrimental to a child's well being only from an adjudiry proceeding in which those issues have been tried.

The statute takes for granted that before parental rights are eptible to termination for the parents' failure to show that itions were corrected within six months after the child was adcated dependent and neglected, the following had already occurred:

(1) a verified petition was filed which sought to have the child adjudicated dependent and neglected and prayed for termination of parental rights (10 O.S.1971, § 1103); and

(2) the parents were given notice that termination, as well as the child's adjudication as dependent and neglected, would be an issue of the proceeding (10 O.S.1971, § 1131); and

(3) the issues involved in termination, as well as dependency and neglect were heard; and

(4) the State bore its burden of proof on the issues and showed by clear and convincing competent evidence that termination of parental rights was warranted under the statute and necessary for the child's welfare; and

(5) the court decided the issues adverse to the parents; and

(6) the court advised the parents that because of their certain specified conduct, the child was a dependent and neglected child under the laws of Oklahoma; and

A.14

) that the facts supported and necessitated terminating
eir parental rights at that time; but that

) the law grants parents a period of six months to attempt
correct those behaviors which are found to be intolerably
trimental to the child; and

) that they had a period of six months to correct those
ecific conditions and come back before the court with
oof that the conditions had been corrected; and

0) that the burden now shifted to them to correct those
nditions and to come before the court within six months
show that change, or an order terminating their parental
ghts would be entered at the expiration of that period.

where, as in the instant case, termination of parental
sought subsequent to a child's adjudication, the action for
ion cannot be bootstrapped into the scope of § 1130 merely
istence of that prior adjudication. This is true whether
e conditions which resulted in that adjudication were
by the parents. The sufficiency of the facts to support
ion must stand or fall on its own merit. Parents of a child
for some reason previously adjudged a dependent and neglected
re entitled to no fewer constitutional and statutory pro-
than surround those parents who are threatened with termina-
first time their child comes to the court's attention.
he mechanics of the requisite procedure are simple. When the
cides to seek termination of parental rights and the child
d was previously adjudged dependent or neglected, a new veri-
ition must be filed seeking to have the child declared depen-
neglected under current conditions. It should, of course, set
ose conditions with particularity, further alleging that those
ns support and necessitate termination of parental rights and
pray for that remedy. If, after notice and hearing, that
determined adverse to the parents, they must be granted the
y period of six months to attempt to correct those conditions
re found by the court to have an intolerable affect on the
This is no more than the State must do to obtain termination
child has not been previously adjudicated.
The construction given the statute by the trial court, and
ed by the majority's affirmance, creates absurd as well as
itutional results. Every dependency and neglect action - even

A 15

Because of the Referee's ruling that the termination hearing was merely a "dispositional" hearing which did not need to be conducted under the rules of evidence, the State was allowed to introduce incompetent evidence and opinions against appellant. The most flagrant example of rank hearsay that I have ever observed on either the trial or appellate bench, was permitted - the assistant district attorney prosecuting the case was allowed, over appellant's objections, to take the stand and testify as a rebuttal witness against appellant as to what one of Derrick's doctors had told him about Derrick's condition.

The Referee found that existing conditions had not been corrected and that appellant's parental rights should be terminated. This order was subsequently confirmed by the Juvenile Judge.

The burden of proof in a termination action is, of course, on the party seeking to obtain it,[1] here, the State of Oklahoma.

1. See, e.g., Application of Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed 2d 517 (1969); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed 2d 551 (1972); Alsager v. District Court of Polk County, Iowa, supra; In Interest of Hochmuth, Ia., 251 N.W.2d 484 (1976); In re Sego, Wash., 513 P.2d 831 (1973); In re Welfare of Larson, Minn., 251 N.W.2d 325 (1977).

Nonetheless, when the State subsequently decided to seek ter-
ation because of "Facts B" (Wesley's alleged abuse) the motion to
minate recited that the action was based on the failure of the
ther and mother . . .after at least (6) months since the adjudica-
n . . . to show that the conditions which resulted in the depen-
cy-neglect . . . [had] been corrected."

This allegation obviously resulted from the State's attempt to
e within the six month provision of § 1130 (a)(3)(c) and thereby
ablish statutory grounds for termination.

This statute was never meant to be applied to the facts before
in this peculiar manner which results in constitutionally deficient
cedure.

The provisions in question read:

"A. The finding that a child is delinquent, or mistreated or neglected, shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:

* * *

"3. A finding that a parent who is entitled to custody of the child:

"a. has failed to give the child the parental care or protection necessary for his physical or mental health, or

termination was not sought and the matter has been long since
d to everyone's (including the court's) satisfaction - forms
tutory basis for a later (1, 5, 8, or 18 years) action by the
or termination by mere allegation that the parents did not
the conditions which resulted in that adjudication. This is
though the parents had no notice that:

there were certain conditions which they needed to correct; or

that if they didn't correct them their parental rights could
be terminated; or

that the burden of proof was on them, not the State.

Besides shifting the burden of proof to the parents, allowing
tent evidence to be introduced against them and denying them
datory six-month grace period, the trial court also denied them
ial by jury. I believe that they had a fundamental right to
by jury which is assured by the Oklahoma Constitution, Art. 2,
d 10 O.S. 1971, § 1110. See, Dissenting Opinion, *J.V. v. State
oma, Department of Institutions, Social and Rehabilitative Services, supra.*
Additionally, I cannot agree with the majority that § 1130 (A)
sets forth standards of proscribed parental conduct with con-
onally sufficient precision. It is virtually identical to the
struck down for vagueness in *Alsager, supra.* Nor, as discussed
do I believe the statute was applied to appellant in a consti-
lly permissible manner.

e majority concedes that "terms such as 'care and protection
for the child's physical or mental health' are terms about
and women of ordinary intelligence may disagree." And, that
answers would vary in large measure in relation to their
social, ethical and religious views ..." This subjectivity
urse, the very heart of the danger of vague laws.
r statute suffers the same "void for vagueness" problems
the statutes struck down in *Alsager, supra; and Roe v. Conn., 417*
(N.D.Ala.197). We ould cure these problems by a restrictive
ion. We have never attempted to narrow the statute (see e.g.,
State, Okl., 469 P.2d 656 (1970); In re Boyer, Okl., 490 P.2d 1076 (1971);
t, Okl., 524 P.2d 790 (1974); Cotter v. Hunter, Okl., 540 P.2d 1169 (1975)),
ajority rejects the opportunity to do so here.

This dissent should not be construed to suggest that Derrick should be returned to his mother's custody. There is no doubt that the record before us supports removing him from her custody and placing him in a protective environment at this time. Neither should this dissent be taken as advocating the notion that abuse of a child is not a sufficient ground upon which to terminate, finally and irreversibly, parental rights, where that action is properly brought and prosecuted.

The only point of this dissent is that if and when termination of parental rights is accomplished, it must be done in a lawful manner that is in accord with our statutes and consistent with the Constitution.

This guarantee of lawful action is absolutely imperative whether we are concerned with wonderful or terrible parents. We must not allow the facts of this case to overwhelm us so that we err in our construction and application of the law. For the truth is that today we create a rule of law which, by the nature of our legal system, will apply to every citizen as fully as it does to Derrick's parents. If we determine that they need not be afforded constitutional rights and statutory protections, then those rights and protections may be withheld from all of us. I am reminded of Justice Frankfurther's following observations on this point in his eloquent dissent in *United States v. Rabinowitz*:[2]

> "The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise. * * *
>
> "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them."

I would reverse the trial court's order terminating appellant's parental rights, leaving the order placing Derrick's temporary custody with the Department in full force and effect.

I am authorized to state that Justice Williams and Justice Doolin join with me in this dissent.

2. 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed 655 (1950).

APPENDIX B

OKLAHOMA STAT. TIT. 10, §1130 (1971),

"§1130. Termination of parental rights in certain situations - The finding that a child is delinquent, or mistreated or neglected, shall not deprive the parents of the child of their parental rights, but a Court may terminate the rights of a parent to a child in the following situations:

(a) Upon a written consent of a parent, including a parent who is a minor, acknowledged as provided in 10 O.S. 1961, §60.5(5), who desires to terminate his parental rights; or

(b) A finding that a parent who is entitled to custody of the child has abandoned it for one (1) year; or

(c) A finding that a parent who is entitled to custody of the child;

(1) has failed to give the child the parental care or protection necessary for his physical or mental health, or

(d) A finding that a parent, having been ordered to contribute to the support of the child, has willfully failed to contribute during the preceding year.

However, nothing contained herein shall prevent a Court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare. Nothing in this Act shall be construed to authorize any Court to terminate the rights of a parent to a child, solely because the parent, in good faith, provides for his child, in lieu of medical treatment, treatment by spirtual means alone through prayer in accordance with the tenets and practice of a recognized church or religious denomination. Laws 1968, c. 282 §130. Eff. Jan. 13, 1969."

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ANN KEYES, Appellant, vs. STATE OF OKLAHOMA DEPARTMENT OF INSTITUTIONS, SOCIAL AND REHABILITATIVE SERVICES, and L. E. RADER, Director of the Department of Institutions, Social and Rehabilitative Services, Appellees. IN THE MATTER OF: KEYES, DERRICK, a child under 18 years of age, to-wit: 2 1/2 years.	)	No. 49,717

NOTICE OF APPEAL

Notice is hereby given that the Plaintiff above named hereby appeals to the Supreme Court of the United States the decision and judgment of the Supreme Court of Oklahoma herein of December 20, 1977, Petition rehearing overruled February 8, 1978.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was mailed with sufficient first-class postage attached thereto this 3 day of MAY, 1978, to the following party:

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